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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHESTER COHEN,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Under *Sedima S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct. 3275, 3285 n.14 (1985), requiring both a relationship among, and a continuity of, predicate racketeering acts to constitute a RICO "pattern," can a "pattern of racketeering activity" be established by proof of a single, discrete fraudulent scheme or activity?

2. Did the Court of Appeals misapprehend the decisions of this Court in holding "that two predicate acts can suffice to satisfy the pattern requirement of RICO" and "that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes Secton 1962(c) to include are satisfied"?

3. Did the Court of Appeals improperly interpret the RICO "enterprise" element in melding the "enterprise" and "pattern" requirements for purposes of defining a "pattern of racketeering activity"?

4. Did the trial court err in instructing the jury concerning the meaning of "pattern of racketeering activity"?

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Chester Cohen respectfully requests that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the Second Circuit, entered on December 4, 1986, which affirmed petitioner's conviction for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") and mail fraud statutes in connection with his participation in a single fraudulent scheme to conceal the interests of others in a single bar.[1]

[1] The Court of Appeals also affirmed the convictions of petitioner's father, Benjamin Cohen, and seven other co-defendants: Matthew Ianniello; Paul Gelb; Bernard Kurtz; Morton Walker; Carl Moskowitz; Sol Goldman; and Alfred Ianniello. A separate petition for a writ of certiorari will be filed on behalf of such co-defendants that will challenge the district court's jury instructions concerning the "pattern of racketeering activity." Petitioner respectfully joins in that petition insofar as the arguments made therein are applicable to him and not inconsistent with the arguments raised herein. Sup.Ct.R. 19.4.

OPINION BELOW

The opinion of the Court of Appeals is reported as *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986), and is reprinted in the Appendix to this petition, *infra*, at A-1 to A-20.[2]

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit, from which review is sought, was entered on December 4, 1986. The decision affirmed the judgment of conviction that was entered against petitioner on February 13, 1986 in the United States District Court for the Southern District of New York, after a five-week trial before the Honorable Edward Weinfeld, United States District Judge, and a jury. A petition for rehearing, with a suggestion for rehearing en banc, was denied on January 28, 1987. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 18, United States Code

§ 1341. Frauds and Swindles.

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized

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[2] Citations to the Appendix to this petition are denoted by an upper-case "A" preceding the page number ("A- "). Citations to the transcript of proceedings in the district court are denoted as "T. __".

depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

* * *

§ 1961. Definitions
As used in this chapter —

. . .

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . .

* * *

§ 1962. Prohibited activities

. . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT OF THE CASE

This case presents the Court with the opportunity to resolve highly significant questions concerning the proper contours of a "pattern of racketeering activity" under the RICO statute. This Court addressed these questions in *Sedima S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct. 3275, 3285 n.14, 3287 (1985); *see also, id.* at 3290 (Powell, J., dissenting), when it criticized the "failure" of the lower courts "to develop a meaningful concept of 'pattern'." *Id.* at 3287.[3]

In *Sedima*, and in the earlier decision of *United States v. Turkette*, 452 U.S. 576, 583 (1981), this Court held that the "pattern" element of RICO is a statutory requirement distinct from the statutory "enterprise" element, each of which must be separately proved by the government, and that, in order to establish a "pattern," the government must demonstrate not merely two predicate racketeering acts, but also relatedness or relationship between the acts *and* a continuity of criminal activity. *Sedima*, 105 S.Ct. at 3285 n.14.

In this case, the Court of Appeals for the Second Circuit adhered to its pre-*Sedima*, pre-*Turkette* opinion in *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980), and held "that two predicate acts can suffice to satisfy the pattern requirement of RICO," 808 F.2d at 190, and "that when a person commits at least two [racketeering] acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes Section 1962(c) to include are satisfied." *Id.* at 192.

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[3] This "pattern" issue transcends this case and transcends criminal litigation. A proper definition of "pattern" applies equally in civil RICO litigation. Civil RICO lawsuits have proliferated with alarming speed. *Sedima*, 105 S.Ct. at 3277-78 n.1. A uniform interpretation of "pattern" is necessary to insure against forum shopping among the circuits and the unwarranted expansion of RICO litigation. A uniform definition of "pattern" can only be provided by this Court.

In short, contrary to *Turkette* and *Sedima* – and the majority of circuit and district courts – the Court of Appeals reasoned that if the "enterprise" is a continuing one, continuity also is established for purposes of determining whether a "pattern of racketeering activity" exists. *Id.* at 190-91. This decision, rather than advancing any "meaningful concept of 'pattern' ", simply perpetuates "the failure" of the lower courts and conflicts with the applicable decisions of this Court.

This case also presents the Court with the opportunity to resolve a clear, and growing, conflict among the circuits concerning the correct parameters of a RICO "pattern". The Court of Appeals decision in this case, *supra*, is directly at odds with the decisions of the Eighth Circuit in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986), and *Holmberg v. Morrisette*, 800 F.2d 205 (8th Cir. 1986). Indeed, the Court of Appeals clearly acknowledged that its decision conflicted with the Eighth Circuit decisions on this very issue:

> "The Eighth Circuit has adopted a contrary view . . . holding that 'one continuing scheme . . . ' did not provide the ' "continuity" sufficient to form a "pattern of racketeering activity" . . . ' That circuit now requires as part of the definition of pattern proof that the defendants engaged in more than one scheme." *Ianniello*, 808 F.2d at 192.

The decision also places the Second Circuit in conflict with the Tenth Circuit, *Torwest DBC Inc. v. Dick*, Dkt. No. 86-1450, slip op. (10th Cir. Jan. 20, 1987), the Seventh Circuit, *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986); *Lipin Enterprises v. Lee*, 803 F.2d 322 (7th Cir. 1986); *Elliot v. Chicago Motor Club Insurance*, 809 F.2d 347 (7th Cir. 1986), and the Ninth Circuit, *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393 (9th Cir. 1986), as well as the majority of district courts. Thus, contrary to the decision here, the majority of lower courts that have considered the "pattern" issue in light of *Sedima* have concluded that repetitive acts done in furtherance of a single, discrete fraudulent or criminal activity

do not form a RICO "pattern", since the continuity of criminal activity envisioned by the statute and *Sedima* is lacking.[4]

The facts of this case relevant to the questions presented on this petition are simply stated. *See, Ianniello*, 808 F.2d at 186-88, 191. According to the government, Chester Cohen acted as a "front" for his father, Benjamin Cohen, and Matthew Ianniello in the ownership of a single bar, the Haymarket. The proof showed that through his corporation, Erco Restaurant, Inc., Chester Cohen held the liquor license for this bar and that, in his original application for the license and in subsequent identical renewal applications, he failed to reveal the "financial and proprietary interests" of others in the Haymarket.[5] The identical renewal applications were mailed annually to the New York State Liquor Authority ("SLA"). Based on these facts, the Court of Appeals concluded that Chester Cohen was properly "convicted on mail fraud predicate acts, which, in turn, were based on deceptive license renewal applications in successive years to the SLA for the same establishment," *Ianniello*, 808 F.2d at 191,[6]

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[4] The Second Circuit also rejected a less stringent "pattern" formulation that at the least requires multiple distinct episodes, even if committed within one overarching scheme, to be shown before a "pattern" is established, finding such a standard to be "a vague and unpredictable rule of decision." *Ianniello*, 808 F.2d at 192 n. 15.

[5] In the original application, Mr. Cohen stated that he was the sole stockholder, director and officer of Erco and that no one else had a financial or proprietary interest in the bar (other than a purchase money loan in favor of the prior owner). (T.228-33.) In each annual renewal application, Mr. Cohen stated that no "changes in fact have occurred since" the filing of the original application.. (T. 233-35.)

[6] As we demonstrate *infra*, because Mr. Cohen's RICO convictions cannot stand, the prejudicial spillover onto the related mail fraud counts—"the prejudicial effect of tarring a defendant with the label of 'racketeer' tainted the conviction on an otherwise valid count"—requires a reversal of his mail fraud convictions as well. *United States v. Guiliano*, 644 F.2d 85, 89 (2d Cir. 1981). *Sam Goody, Inc.*, 518 F.Supp. 1223 (E.D.N.Y. 1981), *appeal dism.*, 675 F.2d 17 (2d Cir. 1982).

and that these acts by themselves constituted a "pattern of racketeering activity" under RICO.[7]

The critical issue presented by the facts of this case is whether Chester Cohen's annual mailing of five identical renewal applications, all making the same misrepresentation for the identical purpose, constitute a RICO "pattern" or whether those mailings were simply repeated acts to carry out a single, discrete fraudulent activity that cannot constitute a "pattern."

ARGUMENT

I.

THE SECOND CIRCUIT ERRED IN HOLDING THAT PARTICIPATION IN ONE FRAUDULENT SCHEME FORMS A RICO "PATTERN" IF DONE IN FURTHERANCE OF AN ONGOING "ENTERPRISE"

In *Sedima*, this Court criticized "the failure of . . . the [lower] courts to develop a meaningful concept of 'pattern [of racketeering activity],' " 105 S.Ct. at 3287, and the exclusive reliance the Courts of Appeals had placed on proof of two racketeering acts to satisfy that "pattern" element. *Id.* at 3275 n.14. The *Sedima* court appropriately noted that "in common parlance two of anything do not generally form a 'pattern' ", *id.*, and instructed the lower courts that not only the number of predicate acts, but also their relationship, or relatedness, one with the other, and the continuity of the criminal conduct thereby represented must also be assessed in determining the existence of a RICO "pattern." *Id.* This Court emphatically stated that "[i]t is this factor of *continuity plus relationship* which combines to produce a pattern.' " *Id., quoting,* S.Rep.No. 91-617, p. 158 (1969).

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[7] The government further established that Matthew Inanniello and Benjamin Cohen had engaged other individuals as "fronts" for them in the ownership of other bars and restaurants and that, through these "fronts," Ianniello and the senior Cohen were able to operate and control numerous bars and restaurants in New York City from which they skimmed profits. The Government, however, failed to show that Chester Cohen had any knowledge – let alone involvement – with respect to any bar or restaurant other than the Haymarket or that he engaged in any criminal activities other than the mailing of successive renewal applications to the SLA with respect to that one bar.

In addition, the *Sedima* court, drawing on this Court's earlier decision in *Turkette*, 452 U.S. at 583, observed that "enterprise" and "pattern" are elements that must be separately pleaded and proved by the government to establish a RICO violation. *Id.* at 3285. As the *Turkette* court stated:

> "In order to secure a conviction under RICO, the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity. . . . ' The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government." 452 U.S. at 583 (footnotes omitted).

On appeal, Chester Cohen urged the *Sedima* criteria of relatedness and continuity as the proper basis for assessing his conduct and contended that the five predicate acts proved against him did not represent a *continuity* of criminal activity sufficient to form a RICO "pattern." Mr. Cohen asserted that the five identical renewal application mailings – which failed to disclose to the SLA financial or proprietary interests of others in a single bar – constituted at most a single fraudulent scheme and represented only one unified criminal activity.[8] In sum, petitioner

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[8] At bar, the government *arguendo* proved one "overall or unitary scheme," spanning several years – "not isolated and unrelated swindles" – and that the mailings of renewal applications were devices "which comprised part of the basic scheme and its desired continued perpetration . . . . " *Bliss v. United States*, 354 F.2d 456, 458 (8th Cir.), *cert. denied*, 384 U.S. 963 (1966). *See also, United States v. Boyd*, 606 F.2d 792, 794 (8th Cir. 1979); *United States v. Cohen*, 516 F.2d 1358, 1364 (8th Cir. 1975).

claimed that each of his predicate acts were so closely related in method, purpose and result as not to constitute the *continuity* required by the *Sedima* "pattern".

In rejecting this appeal, the Second Circuit relied on its pre-*Sedima*, pre-*Turkette* decision in *United States v. Weisman*, and stated that (1) the *Sedima* standard was *dicta* that did not overrule its *Weisman* decision, and (2) even if the *Sedima* footnote were binding, it still was not inconsistent with *Weisman:*

> "This Court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*. [Citations omitted.] Because the *Sedima* footnote does not rise to the level of holding, it is not controlling. It would be particularly inappropriate in this case, however, to reconsider *Weisman*, since that case carefully and thoughtfully addressed the concerns later considered by the Supreme Court in the *Sedima* footnote. See *Weisman*, 624 F.2d at 1121-23. There is no indication in that footnote that the Supreme Court had considered and rejected the *Weisman* analysis." 808 F.2d at 190.

Thus, while inviting this Court to review its decision, the Second Circuit adhered to the *Weisman* formulation and reaffirmed its earlier holding "that two predicate acts can suffice to satisfy the pattern requirement of RICO" and "that when a person commits at least two [such] acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes section 1962(c) to include are satisfied." *Ianniello*, 808 F.2d at 190 and 192. The Court reasoned that both "relatedness and "continuity" are "supplied by the concept of 'enterprise' " which "is a continuing operation." *Ianniello*, 808 F.2d at 190-91, *quoting*, *Weisman*, 624 F.2d at 1122.

In addition, the Court of Appeals expressly rejected any requirement that more than one fraudulent or criminal scheme

(or episode) be established to demonstrate a "pattern" – a holding in direct opposition to the prevailing view in other circuits and among the district courts. *Ianniello*, 808 F.2d at 192 and n.15. *See*, discussion *infra*.

We respectfully submit that the Second Circuit's reasoning is directly at odds with *Sedima*, as it has been interpreted by the majority of lower courts that have considered this issue. We further respectfully submit that the *Weisman-Ianniello* rationale runs contrary to this Court's prior decision in *Turkette*, which clearly holds that "pattern" and "enterprise" are two separate and distinct RICO elements.

A. *The Court Of Appeals Misapprehended Sedima and Its Progeny In Rejecting the Requirement of More than One Scheme.*

In considering this appeal, the Court of Appeals rejected the prevailing interpretation of *Sedima* both in other circuits and among the district courts that more than one criminal scheme is necessary to establish the continuity element of a RICO pattern.

In clarifying its definition of "continuity plus relationship," the *Sedima* Court expressly recognized that the definition of "pattern" provided in 18 U.S.C. § 3575(e) was "enlightening" and "useful in interpreting other sections of the act," 105 S.Ct. at 3255 n.14 – a view that directly contradicts the Second Circuit's *Weisman-Ianniello* "pattern" formulation, which explicitly rejects the Section 3575(e) definition for RICO purposes. As the *Weisman* court stated:

> "[W]e do not believe that the extensive definition of "pattern" in section 3575 requires a district court to give a parallel charge concerning the meaning of "pattern" under RICO. Indeed, the fact that the two sections were enacted simultaneously yet embody different definitions of "pattern" would seem to indicate that Congress intentionally chose to use the term differently in different contexts." 624 F.2d at 1122-23.

Section 3575(e) provides that "criminal conduct forms a pattern if it embraces criminal acts that have similar purposes, results, participants, victims or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events." The other side of the Section 3575 definition is that where "there is only one purpose, one result, one set of participants, one victim and one method of commission"—in other words one scheme—"there is no continuity, and therefore no pattern of racketeering activity." *Torwest DBC, Inc. v. Dick*, 628 F.Supp. 163, 166 (D.Colo. 1986), *aff'd*, Dkt. No. 86-1450, slip op. (10th Cir. Jan. 20, 1987).

This clear inconsistency between *Weisman-Ianniello*, on the one hand, and *Sedima* and numerous lower court authorities on the other,[9] underscores the necessity for this Court's clarification of a RICO "pattern", especially since, when the § 3575 definition is applied in this case, it reveals that Chester Cohen's one fraudulent scheme, with only one purpose, one result, one set of participants, one victim and one method of commission, cannot constitute a "pattern."

The requirement that the "pattern" be composed of more than one discrete criminal activity and instead encompass continuing criminal activity renders Chester Cohen's RICO conviction infirm because, having been found to have participated in

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[9] Numerous courts since *Sedima* have approvingly referred, explicitly or implicitly, to the § 3575 definition as a basis for defining "pattern" under RICO. *See, e.g., Holmberg v. Morrisette*, 800 F.2d 205 (8th Cir. 1986); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1399 (9th Cir. 1986); *Morgan v. Bank of Waukegan*, 804 F.Supp. 970 (7th Cir. 1986); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 648 F.Supp. 419, 425 (D.Minn. 1986); *United States v. Madeoy*, Cr. No. 86-377, slip op. (D.D.C. Jan. 16, 1987). Indeed, in *United States v. Teitler*, 802 F.2d 606, 611-12 (2d Cir. 1986), the Second Circuit itself appeared to adopt the Section 3575 definition, although the Court of Appeals, in this case, purported to rely on both *Teitler* and *Weisman* without clarification of their apparent inconsistency. *See also, Sybedon v. Mendell*, 646 F.Supp. 937, 940 (S.D.N.Y. 1986); *Beck v. Manufacturers Hanover Trust Co.*, 650 F.Supp. 48, 50 (S.D.N.Y. 1986).

only one fraudulent scheme involving only one bar, his conduct amounts to "merely repeated *acts* to carry out the *same* criminal activity" and not the "repeated criminal *activity*" necessary to form a "pattern." *Northern Trust Bank v. Inryco, Inc.*, 615 F.Supp. 828, 831 (N.D.Ill. 1985) (emphasis in original). "It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.' " *Id.*[10]

This rule that one ongoing scheme does not provide "the 'continuity' sufficient to form a pattern of racketeering activity' " under the *Sedima* analysis is now settled law in the Eighth Circuit. *Superior Oil*, 785 F.2d at 257; *accord, Holmberg v. Morisette*, 800 F.2d at 210 (8th Cir. 1986). That circuit requires proof that the defendant engaged in more than one scheme. *Id.* In *Superior Oil*, the defendants converted Superior's oil to their own purposes and filed false reports to conceal their fraudulent scheme. The Court found that this unitary scheme did not constitute a RICO "pattern":

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[10] In concluding that the continuity element of the RICO pattern may be supplied by the existence of a continuing enterprise – and need not involve more than one scheme – the Court of Appeals also mistakenly relied upon Section 1962(b). The court reasoned that insofar as that section prohibits predicate acts aimed at taking over an otherwise legitimate enterprise it prohibits even a single scheme and that to require *two* schemes as part of the pattern definition would eviscerate that section. But the court's assumption that one scheme is sufficient for Section 1962(b) – and therefore should be sufficient for purposes of Section 1962(c) – is erroneous and avoids the critical issue. Indeed, the court's assumption is simply another way of expressing the erroneous *Weisman* formulation that the "enterprise" can provide the continuity element of the "pattern" and rejecting the Section 3575 definition. *See, Richter v. Sudman*, 634 F.Supp. 234, 237-38 (S.D.N.Y. 1986). Moreover, the Court's reference to § 1962(b) is entirely besides the point since Mr. Cohen was neither charged nor convicted under that RICO subsection. In this regard, it is noteworthy that under § 1962(c) the "enterprise" cannot be the "person" who conducts that enterprise through a "pattern of racketeering activity." *Schoefield v. First Commodity Corp.*, 793 F.2d 28, 29-30 (1st Cir. 1986) (citing cases); *United States v. DiCaro*, 772 F.2d 1314, 1319-20 (7th Cir. 1985); *Bennett v. United States Trust Co., supra*, 770 F.2d at 315. A similar distinction may not apply under § 1962(b). *See, e.g., Vietnam Veterans of America, Inc. v. Guerdon Industries, Inc.*, 644 F.Supp. 951, 956-57 (D.Del. 1986).

> "Superior Oil has, however, failed to prove the 'continuity' sufficient to form a 'pattern of racketeering activity.' The actions of Fulmer, Branch, and Nichols comprised one continuing scheme to convert gas from Superior Oil's pipeline. There was no proof that Fulmer, Branch, or Nichols had ever done these activities in the past and there was no proof that they were engaged in other criminal activities elsewhere . . . . . [T]he record reveals one isolated fraudulent scheme. On the facts of this case, we agree with the court's conclusion in *Northern Trust, Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832, (D.C.Ill. 1985), that '[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. . . . It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts as 'pattern of racketeering activity.' " *Id.* at 257.

Similarly, in *Holmberg*, the court took specific note of the *Sedima* Court's "expressly approved use" of the § 3575(e) definition, 800 F.2d at 210, and rejected a RICO "pattern" composed of multiple "acts of wire and mail fraud related to a common purpose or scheme . . . to draw down [on] three letters of credit." 800 F.2d at 210. Finding "no evidence that [the defendants] had engaged in like activities in the past or that they were engaged in other criminal activities," the Eighth Circuit concluded "as a matter of law" that "the continuity necessary to form a 'pattern' " had not been shown. *Id., citing, Superior Oil. Accord, e.g., H.J. Inc. v. Northwestern Bell Telephone Co.*, 648 F.Supp. 419, 423-25 (D.Minn. 1986);[11] *Ford Motor Co. v. B&H Supply,*

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[11] In *H.J. Inc.*, the district court dismissed a RICO claim and held that an ongoing, six year long scheme by Northwestern Bell to illegally influence members of the Minnesota Public Utilities Commission through multiple acts of bribery and other fraudulent activities was a single scheme that did not satisfy the "continuity" prong of the "pattern" inquiry. 648 F.Supp. at 425.

Inc., 646 F.Supp. 975, 999-1001 (D.Minn. 1986);[12] *Clodfelter v. Thurson*, 637 F.Supp. 1034, 1040 (E.D.Mo. 1986); *Allright Missouri, Inc. v. Billeter*, 631 F.Supp. 1328 (E.D.Mo. 1986). It cannot be gainsaid that, in the Eighth Circuit, Chester Cohen did not engage in a "pattern of racketeering activity."[13] *See, e.g., H.J. Inc.* and *Ford Motor Co., supra.* It also cannot be gainsaid that "the extremely severe penalties authorized by RICO's criminal provisions," *Sedima*, 105 S.Ct. at 3294 (Marshall, J., dissenting), should not be so differently applied to one like Chester Cohen depending only on the fortuity of the government's venue decision.[14]

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[12] In *Ford Motor*, the court found that no "pattern" was shown by an ongoing, continuing fraudulent scheme over numerous years to market, sell and distribute counterfeit Ford automotive replacement parts in counterfeited and spurious Ford packaging. 646 F.Supp. at 1001.

[13] The Ninth Circuit similarly has held that "the 'threat of continuing activity' " required to form a "pattern" under *Sedima* is not satisfied by proof of only a single fraudulent transaction. *Schreiber Distributing Co. v. Serv-Well Furniture Co., supra*, 806 F.2d at 1399.

[14] The Seventh and Tenth Circuits have adopted a variant of the *Superior Oil* formulation that nonetheless places those courts in direct conflict with the Second Circuit's decision in this case. These courts now reject a formulation of "pattern" that is focused on the number of predicate acts, specifically rejecting their pre-*Sedima* view that two acts are alone sufficient, *Morgan v. Bank of Waukegan, supra*, 804 F.2d at 975; *Torwest DBC, Inc. v. Dick, supra*, slip op. at n.3, and have instead opted for a "factually-oriented standard, as opposed to a hard and fast set rule," *Morgan*, 804 F.2d at 977, or "a bright-line test in the abstract," *Torwest*, slip op. at .

Under the Seventh Circuit's approach, to assess "continuity," the courts are directed to consider a number of "relevant factors," including: "the number and *variety of predicate acts* and the length of time over which they were committed, *the number of victims, the presence of separate schemes and the occurrence of distinct injuries.*" *Morgan*, 804 F.2d at 975-76 (emphasis supplied). Applying this standard, the Seventh Circuit has rejected several RICO claims. *See, e.g., Lipin Enterprises, Inc. v. Lee, supra*, 803 F.2d at 324 (dismissing RICO claims involving a single scheme, single victim and single injury); *Elliott v. Chicago Motor Club Insurance, supra*, 809 F.2d 347

(Footnote Continued)

Indeed, prior to the Court of Appeals decision, this approach to the "continuity" prong of the *Sedima* standard not only was adopted by the trial judge in this case, *Bear Creek Productions, Inc. v. Saleh*, 643 F.Supp. 489, 495 (S.D.N.Y. 1986) (Weinfeld, D.J.) (subsequent to Mr. Cohen's trial),[15] but also prevailed

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(dismissing a RICO claim founded on "several acts of mail fraud over a period of several years in furtherance of an overall scheme to defraud."); *Marks v. Pannell Kerr Forster*, Dkt. Nos. 86-1609, slip op. (7th Cir. Feb. 9, 1987).

Likewise, the Tenth Circuit in *Torwest* upheld the dismissal of a RICO claim involving numerous racketeering acts committed over numerous years. "The undisputed facts . . . reveal that the single [fraudulent] scheme . . . involved one victim . . . and had a single goal . . . . The fraud was perpetrated at the time Towest DBC purchased DBC. The subsequent sales of the parcels . . . were simply the means by which the fruits of the fraud were realized . . . . " So too here, Chester Cohen's fraud was committed by the concealments made in the original liquor license application and the subsequent renewal applications indicating that no changes in fact had occurred simply were the means by which the initial fraud was perpetuated.

A number of district courts similarly have undertaken the "middle course," *Morgan*, 804 F.2d 975, that either is "fact oriented" or focused on the existence of separate "episodes" within a larger scheme. *See, e.g., United States v. Madeoy, supra* (upholding a RICO indictment alleging twenty three separate real estate transactions over a span of five years, involving many different victims – the Veterans Administration and 23 purchasers – and causing a new injury to each separate victim); *Techreations, Inc. v. National Safety Council*, 650 F.Supp. 337 (N.D.Ill. 1986); *Gidwitz v. Stirco, Inc.*, 646 F.Supp. 825, 827-29 (N.D.Ill. 1986); *Eastern Corporate Federal Credit Union v. Peat, Marwick, Mitchell & Co.*, 639 F.Supp. 1532 (D.Mass. 1986); *Papai v. Cremosnik*, 635 F.Supp. 1402 (N.D.Ill. 1986); *Ghouth v. Conticommodity Services, Inc.*, 642 F.Supp. 1325 (N.D.Ill. 1986); *Paul S. Mullin & Associates, Inc. v. Bassett*, 632 F.Supp. 632 (D.Del. 1986); *Medallion TV Enterprises, Inc. v. Selectv of California, Inc.*, 627 F.Supp. 1290 (C.D.Cal. 1986); *Graham v. Slaughter*, 624 F.Supp. 222 (N.D.Ill. 1985); *Utz v. Correa*, 631 F.Supp. 592 (S.D.N.Y. 1986); *Frankart Distributors, Inc. v. RMR Advertising*, 632 F.Supp. 1198 (S.D.N.Y. 1986).

[15] Judge Weinfeld dismissed a RICO claim where "[t]he frauds committed were . . . part of a single scheme." 643 F.Supp. at 495. "As noted in *Richter v. Sudman*, [634 F.Supp. 234, 240 (S.D.N.Y. 1986),] 'the issue is not the continuity of a single activity, but whether the defendants had a practice of engaging in the same or similar types of activity.' Thus, numerous cases in this circuit, examining the question at length, have held that where the criminal acts alleged form a single scheme, they do not constitute a pattern of racketeering." *Id.* (footnotes omitted.)

among "the considerable majority of the judges" in the Southern District of New York: " '[i]n this district, a single fraudulent scheme, though composed of numerous predicate acts, will not suffice to constitute a "pattern" under RICO.' "[16] *Sybedon Corp. v. Mendell, supra*, 646 F.Supp. at 939, *quoting, 225 Broadway Co. v. Sheridan*, 85 Civ. 9231, slip op. at 6 (S.D.N.Y. Apr. 30, 1986). *Accord, e.g., Baum v. Phillips, Appel & Waldel, Inc.*, 648 F.Supp. 1518, 1533-35 (S.D.N.Y. 1986); (S.D.N.Y. 1986); *Philatelic Foundation v. Kaplan*, 647 F.Supp. 1344 (S.D.N.Y. 1986) (dismissing RICO action predicated on defendants' multiple guilty pleas to mail and wire fraud relating to the fraudulent alteration and procurement of hundreds of "certificates of authenticity" from 1983 through 1985: when, as here, "the criminal acts are repetitive and in furtherance of the overarching scheme" the "continuity" prong of the "pattern" is not satisfied. *Id.* at 1347.); *Beck v. Manufacturers Hanover Trust Co.*, 645 F.Supp. 675, 683-84 (S.D.N.Y. 1986); *Emmanouilides v. Buckthorn, Ltd.*, 642 F.Supp. 964 (S.D.N.Y. 1986); *Richter v. Sudman*, 634 F.Supp. 234 (S.D.N.Y. 1986);[17] *Soper v. Simmons Int'l., Ltd.*, 632 F.Supp. 244 (S.D.N.Y. 1986); *Anisfeld v. Cantor Fitzgerald & Co.*, 631 F.Supp. 1461 (S.D.N.Y. 1986); *Modern Settings, Inc. v. Prudential-Bache Securities, Inc.*, 629 F.Supp. 860 (S.D.N.Y. 1986); *225 Broadway Co. v. Sheridan*, Dkt. No. 85 Civ. 9231,

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[16] Interestingly, following the decision in this case, the judges of the Southern District continue to adhere to their prior view and reject *"Ianniello* [as] a criminal case which did not raise the serious problems presented by civil RICO." *Shopping Mall Investors, N.V. v. E.G. Frances & Co., Inc.*, Dkt. No. 84 Civ. 1469, slip op. at 8n.* (S.D.N.Y. Jan. 29, 1987). As *Sedima* makes clear, however, no such distinction between civil and criminal RICO cases is justified. A uniform definition of "pattern" must apply to all RICO actions. It, thus, is not surprising that support for this unwarranted civil/criminal distinction can be found only in the *Sedima* dissents. *Id.*

[17] In *Richter v. Sudman*, the court aptly observed that "a definition of pattern [must] effectively distinguish between a pattern of activity and a single transaction whose separate, component acts *mimic* a pattern . . . . " 634 F.Supp. at 240.

slip op. (S.D.N.Y. April 30, 1986); *Crummere v. Brown*, Dkt. No. 85 Civ. 1376, slip op. (S.D.N.Y. April 3, 1986).[18]

B. *The "Enterprise" and "Pattern" Requirements Are Separate and Distinct.*

In this case, rather than fashion a "meaningful" concept of "pattern" as a distinct RICO requirement, the Court of Appeals opinion instead draws upon the concept of "enterprise" to supply both the relatedness and continuity aspects addressed in *Sedima. Ianniello*, 808 F.2d at 190-92. This melding of the "enterprise" and "pattern" elements, when coupled with the extravagant view of "enterprise" espoused by the Second Circuit, works a particularly anomalous and unreasonable result here.

The Second Circuit has adopted a definition of "enterprise," in the context of a "group of individuals associated in fact," 18 U.S.C. § 1961(4), that renders it no more than a conspiracy to commit predicate acts: "This Circuit requires that . . . the enterprise be a continuing operation and that the [predicate racketeering] acts be related to the common purpose." *Ianniello*, 808 F.2d at 191. *Accord, United States v. Bargaric*, 706 F.2d 42, 55

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[18] This view also prevailed among the district courts elsewhere in the Second Circuit. *See, e.g., Carlucci v. Owens-Corning Fiberglas Corp.*, 646 F.Supp. 1486, 1492-94 (E.D.N.Y. 1986); *Schaafsma v. Marriner*, 641 F.Supp. 576, 578-81 (D.Vt. 1986); *B.J. Skin & Nail Care v. International Cosmetic Exchange, Inc.*, 641 F.Supp. 563 (D.Conn. 1986). It continues to prevail as the majority view among the district courts nationwide. *See, e.g., Behunin v. Dow Chemical Co.*, 650 F.2d 1387 (D.Colo. 1986); *Brent Liquid Transport, Inc. v. GATX Leasing Corp.*, 650 F.Supp. 467, 475 (N.D.Miss. 1986); *McIntyres' Mini Computer Sales Group, Inc. v. Creative Synergy Corp.*, 644 F.Supp. 580 (E.D.Mich. 1986); *District Telecommunications v. District Cablevision, Inc.*, 638 F.Supp. 418 (D.D.C. 1985); *Small v. Goldman*, 637 F.Supp. 1030 (D.N.J. 1986); *Agristor Leasing v. Meuli*, 634 F.Supp. 983 (N.D.Ill. 1986); *Torwest DBC, Inc. v. Dick, supra; Dunham v. Independence Bank of Chicago*, 629 F.Supp. 983 (N.D.Ill. 1986); *Grant v. Union Bank*, 629 F.Supp. 570 (D.Utah 1986); *Northern Trust Bank v. Inryco, supra; United States v. Yonan*, 622 F.Supp. 721 (N.D.Ill. 1985); *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F.Supp. 1418, 1423 (W.D.Okla. 1985); *Fleet Management Systems, Inc. v. Archer-Daniels-Midland Co., Inc.*, 627 F.Supp. 550 (C.D.Ill. 1986); *Allington v. Carpenter*, 619 F.Supp. 474, 477-78 (C.D.Cal. 1985).

(2d Cir.), *cert. denied*, 464 U.S. 840 (1983); *United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983); *but see, Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985).[19] Moreover, that court holds that proof of the "pattern" alone can serve as proof of the "enterprise" and allows an "enterprise" to be "in effect, no more than the sum of the predicate racketeering acts," *United States v. Bargaric, supra*, and not at all "distinct and independent". *United States v. Mazzei, supra.* Under the Second Circuit's approach, "an enterprise with 'a single purpose' . . . can provide the basis for a section 1962(c) violation." *Ianniello*, 808 F.2d at 191.

This unbridled approach is in direct conflict with the decision of this Court in *Turkette*, as well as the prevailing view in other circuits. Thus, in *Turkette*, this Court unhesitatingly stated that the RICO "enterprise" and the RICO "pattern" are separate and distinct statutory elements that must be independently proved. 452 U.S. at 583. While this Court observed that "the proof used to establish these separate elements may *in particular cases* coalesce, proof of one does not necessarily establish the other." *Id.* (emphasis supplied). The *Turkette* Court instead emphasized that the " 'enterprise' *is not* the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages" and is established by the government "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* (emphasis supplied).

Likewise, the Third, Fourth, Fifth, Eighth, Ninth and District of Columbia Circuits, in contrast to the Second Circuit, hold that the government must demonstrate that an "enterprise" consisting of a "group of individuals associated in fact," is possessed of an independent existence above and beyond the activities that make up the "pattern": " '[t]he term "enterprise" must signify an association that is substantially different from the acts which form the "pattern of racketeering activity.' " *Superior Oil*, 785 F.2d at 258, *quoting, United States v. Anderson*, 626 F.2d 1358,

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[19] This also is the approach of the Eleventh Circuit. *See, e.g., United States v. Weinstein*, 762 F.2d 1522, 1537 (11th Cir. 1985).

1365 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).[20] In these circuits, an "enterprise" must not only display a common or shared purpose and some continuity of structure and personnel, but also must have "an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering." *United States v. Lemm*, 680 F.2d 1193, 1198 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983). Indeed, these circuit courts hold that the more expansive approach espoused by the Second Circuit not only is contrary to *Turkette*, but also renders the concept of "enterprise" to be no different from "simple conspiracies to perpetrate the predicate acts of racketeering" and merely "a recidivist statue" contrary to Congressional intent. *United States v. Bledsoe*, 674 F.2d 647, 664 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982).

The distinction between the definitional formulations of "enterprise" becomes manifest in this case, where the "enterprise" proved by the government was "no more than the sum of the predicate racketeering acts," *United States v. Bargaric*, *supra*, undertaken with "[t]he common purpose . . . to skim profits," *Ianniello*, 808 F.2d at 192—in other words, no "enterprise" at all under *Turkette* and in the majority of circuits. Taken together with the Second Circuit's continued adherence to *Weisman*, that court's "enterprise" formulation leads to the untoward and impossible result here, where the "pattern" is established by the "enterprise," the "enterprise" is established by the "pattern," and Chester Cohen, whose only involvement in either was at most in one fraudulent scheme to maintain a liquor license for one bar, is wrongfully

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[20] *Accord, e.g., Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438, 440-41 (5th Cir. 1987); *Shafer v. Williams*, 793 F.2d 1030, 1032 (5th Cir. 1986); *United States v. Tillet*, 763 F.2d 628, 631 (4th Cir. 1985); *United States v. Riccobene*, 709 F.2d 214, 222-24 (3rd Cir.), *cert. denied*, 464 U.S. 849 (1983); *United States v. Bledsoe*, 674 F.2d 647, 664 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982); *United States v. Lemm*, 680 F.2d 1193, 1197-1201 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); *United States v. Griffin*, 660 F.2d 996, 1000 (4th Cir. 1981); *District Telecommunications Dev. Corp. v. District Cablevision, Inc.*, 638 F.Supp. 418, 420-21 (D.D.C. 1985); *Allington v. Carpenter*, 619 F.Supp. 474, 479 (C.D. Cal. 1985); *Medallion TV Enterprises v. Selectv of California*, 627 F.Supp. 1290 (C.D. Cal. 1986).

labeled and sentenced as a racketeer. The resulting circularity of the lower court's rationale vitiates the distinction between the "enterprise" and "pattern" elements drawn in *Turkette* and unfairly penalizes a minor actor, whose involvement at most was limited to a single scheme.

In short, the Second Circuit's misapprehension of *Sedima, supra*, and its misinterpretation of *Turkette* has converted RICO into no more than a garden variety conspiracy statute with draconian penalties for a peripheral defendant like Chester Cohen. This plainly was not the Congressional intent, *e.g., United States v. Bledsoe, supra*, and should not go uncorrected by this Court.

It finally should be noted that this case represents but another example of the "extraordinary expansion of mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was subject only to state criminal or civil law." *United States v. Weiss*, 752 F.2d 777, 791 (2d Cir. 1985) (Newman, J., dissenting). *See, Sedima*, 105 S.Ct. at 3293 (Marshall, J., dissenting). *See also, United States v. Carpenter*, 791 F.2d 1024 (2d Cir.), *cert. granted*, 107 S.Ct. 666 (1986). Here, Chester Cohen's false statements to the SLA at best were misdemeanors under New York law, N.Y.A.B.C. Law § 130(2), and, more likely, grounds for the administrative revocation of his liquor license. The government, however, relying on the "inexorable expansion of the mail . . . fraud statute[ ]," *United States v. Siegel*, 717 F.2d 9, 24 (2d Cir. 1983) (Winter, J., dissenting), created federal mail fraud crimes from Mr. Cohen's concealments and then greedily utilized such annual mailings as the predicate acts for his RICO prosecution.[21] This is an unwarranted, abusive and overreaching application of RICO, one clearly contrary to "[t]he responsible use of prosecutorial discretion with respect to

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[21] Interestingly, recently enacted New York RICO legislation provides neither for A.B.C. Law nor federal mail fraud violations as predicate acts. N.Y. Penal Law § 460.10.

criminal RICO prosecutions – which often rely on mail and wire fraud as predicate acts – given the extremely severe penalties authorized by RICO's criminal provisions." *Sedima*, 105 S.Ct. at 3294 (Marshall, J., dissenting). *See also, Id.* at 3287. Indeed, the Second Circuit itself has previously warned that "the potential broad reach of RICO poses a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended," and thus has "caution[ed] against undue prosecutorial zeal in invoking RICO." *United States v. Huber*, 603 F.2d 387, 395-96 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). *See also, Weismann*, 624 F.2d at 1123.

Whatever the merits of such a mail fraud RICO prosecution against Mr. Cohen's co-defendants, who were involved with several bars or with several illicit schemes concerning the same bar and *arguendo* thereby engaged in a RICO pattern even under the *Superior Oil* standard, when the nature of the charges against Mr. Cohen – his participation in one scheme involving only one bar[22] – is combined with the lax and meaningless "pattern" requirement applied by the Second Circuit in this case, the resulting conviction of a peripheral and minor defendant like Chester Cohen as a "racketeer" is unwarranted and an "extraordinary" use of the RICO statute. Indeed, the application of the "pattern" standard adopted in this case effectively reduces the RICO statute to no more than a "super" conspiracy statute that carries "extremely severe" and enhanced penalties, but requires only two acts to make one a member (as opposed to one act under 18 U.S.C. § 371). *See, e.g., United States v. Bledsoe, supra.*

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[22] That Mr. Cohen engaged in but a single fraudulent scheme is clear from the statutory context in which his crime arose. At the time of the events at issue, the SLA required that a renewal application be filed each year. This requirement since has been abrogated in favor of mandating a license renewal only once every three years. (T. 298.) This change in the frequency of renewal applications obviously does not alter the underlying concealment scheme, or any material aspect of it, one iota. It only affects the number of "merely 'ministerial acts performed in the execution of a single [allegedly] fraudulent scheme.' " *Soper v. Simmons Intl., Ltd., supra*, 632 F.Supp. at 254. We respectfully submit that this quirk in the operation of the liquor law cannot be allowed to determine whether or not Chester Cohen is a "racketeer."

Sound policy and proper adherence to the "pattern" requirements enunciated by this Court in *Sedima* avoid this untoward result. *Sedima* and its legitimate progeny teach that in order to establish a "pattern," the Government must show both: (1) that the acts constituting the "pattern" are *related*; and (2) that those related acts represent a "*continuity*" of criminal activity. As we have shown *supra*, "continuity", in this context, requires "repeated criminal *activity*, not merely repeated *acts* to carry out the *same* criminal activity." *Northern Trust Bank*, *supra*, 615 F.Supp. at 831. Stated otherwise, for the Government to prevail under an appropriate definition of "pattern," it must demonstrate not only that the criminal acts are related (as opposed to isolated, unrelated criminal conduct), but also that the acts are not *so* closely related in method, purpose and result as to constitute merely repeated efforts or steps to accomplish a single criminal activity or end.

In this case, Chester Cohen engaged in only a single, discrete and continuous fraudulent scheme. " 'It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts as a "pattern of racketeering activity." ' " *Superior Oil*, 785 F.2d at 257, *quoting*, *Northern Trust Bank*, *supra*. Indeed, all of Chester Cohen's predicate acts were "merely 'ministerial acts performed in the execution of [this] single [allegedly] fraudulent scheme,' " *Soper v. Simmons Int'l, Ltd.*, *supra*, 632 F. at 254, and amounted to no more than "a single transaction whose separate, component acts mimic a pattern." *Richter v. Sudman*, *supra*, 634 F.Supp. at 240. As previously noted, because all of the predicate acts had "only one purpose, one result, one set of participants, one victim and one method of commission, there is no continuity and, therefore, no pattern of racketeering activity." *Torwest DBC, Inc. v. Dick*, *supra*, 628 F.Supp. at 166.

The contrary holding of the Court of Appeals finding Chester Cohen to have engaged in a RICO "pattern" is error that

should be corrected by this Court.[23] "In light of the variety of approaches taken by the lower courts and the importance of the issues" concerning the RICO "pattern" in both criminal and civil contexts,[24] *Sedima*, 105 S.Ct. at 3280, this Court should grant certiorari to review the decision of the Second Circuit.

II.

THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY WITH RESPECT TO THE "PATTERN OF RACKETEERING ACTIVITY" WERE ERRONEOUS

In its opinion, the Court of Appeals upheld the district court's charge to the jury concerning the definition of a "pattern of racketeering activity" on the basis of the *Weisman* decision. *Ianniello*, 808 F.2d at 189-91. Obviously, if, as we urge *supra*, *Weisman* no longer is good law under *Sedima* and its legitimate progeny, the district court's jury instructions were fatally flawed.[25]

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[23] As noted *supra*, in this case, the Second Circuit rejected not only *Superior Oil* as "a strained and inappropriate reading of the statutory language," 808 F.2d at 192, but also the "middle course" adopted by the Seventh and Tenth Circuits as "a vague and unpredictable rule of decision," *id.* at n.15, and instead adhered to its prior view that two predicate acts alone suffice to satisfy the RICO pattern. *Id.* at 190. Under *Sedima*, or any of the alternate standards adopted by the other circuit courts, Chester Cohen's conviction must be reversed, since, under *Superior Oil*, he did not engage in a "pattern" and under, *e.g.*, *Morgan*, the district court's charge failed to adequately apprise the jury of the meaning and requirements of that term.

[24] As noted *supra*, the same definition of "pattern" applies in both civil and criminal litigation under RICO. For this reason, the "pattern" issue transcends this case and transcends criminal litigation. The issues raised at bar apply equally to civil RICO actions.

[25] In its instructions to the jury, the District Court lumped together the separate RICO elements of "enterprise," "pattern" and "at least two acts of racketeering activity," *Sedima*, 105 S.Ct. at 3285, and erroneously charged that "a pattern of racketeering activity means two or more acts in violation of federal criminal laws undertaken in aid of the affairs of the enterprise." (T. 3036.) Moreover, in its specific instructions concerning Counts One and

(Footnote Continued)

Chester Cohen is entitled to a new trial, at the very least, since the erroneous charge goes to the very heart of the jury's fact finding that he was a RICO conspirator and participant. As this Court made clear in *Townsend v. Sain*, 372 U.S. 293, 315 n.10 (1963): "A new trial is required if the trial judge or the jury, in finding the facts, has been guided by an erroneous standard of law."[26]

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Dated: March 26, 1987

Respectfully submitted,

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Two, the trial court continued this error by simply equating "pattern of racketeering activity" with "at least two acts of racketeering." (T. 3040; 3043; 3060.) Such instructions plainly were improper under *Sedima* and highly prejudicial to Chester Cohen, whose guilt under the RICO counts was predicated solely on the jury's finding him to have participated in only the Erco SLA fraud.

[26] We understand that the error of the district court's RICO charge will be discussed fully in the petition for certiorari on behalf of Mr. Cohen's co-defendants. *United States v. Ianniello*, Dkt. No. . Petitioner joins in the arguments advanced in that petition. *See*, Sup. Ct. R. 19.4.

APPENDIX

UNITED STATES of America, Appellee,

v.

Matthew IANNIELLO, Benjamin Cohen, Paul Gelb, Alfred Ianniello, Carl Moskowitz, Morton Walker, Chester Cohen, Bernard Kurtz, and Sol Goldman, Defendants-Appellants.

Nos. 1407, 1411, 1400, 1401, 1408, 1402, 1403, 1409, 1410, Docket 86-1088, -1089, -1090, -1091, -1092, -1093, -1102, -1109, -1110.

United States Court of Appeals,

Second Circuit.

Argued July 14, 1986.

Decided Dec. 4, 1986.

Defendants were convicted in the District Court for the Southern District of New York of conspiracy to violate RICO, and substantive violation of RICO as well as related counts of mail fraud and tax evasion. Defendants appealed. The Court of Appeals, Mahoney, Circuit Judge, held that: (1) indictment was sufficient in regard to mail fraud counts; (2) jury was properly instructed that acts giving rise to RICO violation must be related to enterprise and to continuous activity; (3) defendant's convictions on mail fraud predicate acts were sufficient to constitute pattern of racketeering activity within meaning of RICO; (4) finding of intent needed to support defendants' conviction for mail fraud in defrauding State Liquor Authority was supported by evidence; (5) in proving mail fraud based on sales tax evasion, Government was only required to show specific intent to evade sales tax; (6) federal government can prosecute misuse of mails where misuse also violates state liquor regulations; and (7) statement of coconspirator was sufficiently corroborated to support convictions.

Affirmed.

Before WINTER and MAHONEY, Circuit Judges, and LASKER, District Judge.*

MAHONEY, Circuit Judge:

Defendants appeal from judgments entered upon their convictions by a jury in the Southern District of New York raising a number of issues. We affirm, and discuss only the questions concerning the construction of the indictment, the definition of a pattern of racketeering activity under the Racketeer Influenced and Corrupt Organizations Act, Pub.L.No. 91-452, tit IX, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1982 & Supp. III 1985)) ("RICO"), the elements of mail fraud based upon fraud on the New York State Liquor Authority ("SLA") and state tax authorities, the effect of the twenty-first amendment on the federal government's ability to regulate the mails, and the corroboration necessary to convict on a co-conspirator's statement.

The indictment alleged, *inter alia*, a broad conspiracy to violate RICO, substantive violations of RICO, mail fraud, bankruptcy fraud and tax evasion.

At trial, the government established[1] that the defendants were part of a group that skimmed profits from bars and restaurants that they owned and operated in New York City. Matthew Ianniello and Benjamin Cohen[2] directed the enterprise's activities, supervising and overseeing its affairs from offices in Manhattan.[3] While they received the greatest profits from its

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*The Honorable Morris E. Lasker, Senior District Court Judge of the United States District Court for the Southern District of New York, sitting by designation.

[1] The government's case was built primarily on electronic audio and video surveillance at the offices of Matthew Ianniello and Benjamin Cohen at C & I Trading, which were at 135 West 50th Street in Manhattan. The operations of the group were directed from C & I Trading. The surveillance was conducted from September 7, 1982 to December 27, 1982.

[2] References to "Ianniello" and "Cohen" are to Matthew Ianniello and Benjamin Cohen respectively.

[3] See *supra* note 1.

operations, the bars and restaurants ostensibly were owned and managed by others, who acted as "fronts" for Ianniello and Cohen.

As part of the scheme to skim money, the defendants obtained liquor licenses from the SLA for the businesses. Ianniello's and Cohen's financial interests in and receipt of money from the bars and restaurants were concealed from the SLA. This eased the granting of the liquor licenses and made the skimming more difficult to detect.

In addition, the scheme included a plan to defraud the New York State Department of Taxation and Finance (the "Department") by understating gross receipts in sales tax returns. Further, the defendants defrauded the legitimate creditors of the Peppermint Lounge, one of the enterprises involved in this operation,[4] by skimming its receipts while the bar was in bankruptcy proceedings. Finally, various of the recipients of the skimmed cash receipts failed to pay personal income taxes on those receipts.

A lawyer and accountant also participated. Carl Moskowitz ("Moskowitz"), the lawyer, prepared false liquor license applications that were submitted to the SLA for the Mardi Gras, the Haymarket, the Grapevine and the Peppermint Lounge.[5] Sol Goldman ("Goldman"), the accountant, helped conceal the skimming and diversion of income from the Peppermint Lounge, the New Peppermint Lounge and Umberto's Clam House through false books and records, and prepared and filed false state tax returns for the same enterprises. Goldman also assisted in the bankruptcy proceedings of the Peppermint Lounge.

The most profitable business was P & G Funding Corp., which operated the Mardi Gras. The bar opened in January,

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[4] The Peppermint Lounge was also known at various times as the "Hollywood" and "G.G. Barnum's." The other establishments involved were the "Mardi Gras," the "Haymarket," the "Grapevine," "Umberto's Clam House" and the "New Peppermint Lounge," also known as the "Electric Circus" prior to its acquisition by certain of the defendants herein, all at various locations in Manhattan, New York City.

[5] Moskowitz maintained an office at C & I Trading, for which he paid no rent.

1979, and for the first two years of its operation the owners of record were Paul Gelb and his wife, Pauline Gelb.[6] Subsequently, Pauline Gelb became the sole owner of record. From the time the Mardi Gras opened its doors in 1979, Ianniello, Cohen and Gelb regularly skimmed its cash receipts, dividing the money equally among themselves. By the end of 1982, the defendants had divided over $2 million in unreported income.

The original liquor license application prepared by Moskowitz and filed by the Mardi Gras with the SLA in October 1978 stated that no one other than Paul and Pauline Gelb had a financial interest in the Mardi Gras or would share in the receipts of the bar, hiding Ianniello's and Cohen's stake in the Mardi Gras. This was repeated in the later liquor license renewal applications. These defendants also concealed their skimming at the Mardi Gras from the Department by understating the bar's true gross receipts.

The record owner of Osbro Restaurant, Inc., which did business as "Umberto's Clam House," was Robert Ianniello,[7] and the restaurant was managed by Oscar Ianniello.[8] Their two brothers, Matthew Ianniello and Alfred Ianniello, however, controlled the business and skimmed its receipts. Liquor license renewal applications filed with the SLA did not disclose Matthew Ianniello's interest in Umberto's Clam House. The books and records of the restaurant, kept by Goldman, concealed the skimming by showing false receipts and expenses. The sales tax return for the period September through November 1982 also understated the true receipts of the restaurant, as well as the amount of sales tax due.

The "Peppermint Lounge," Mar-Jear Restaurant, Inc., was a bar and nightclub located in Manhattan. While ostensibly

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[6] Pauline Gelb was indicted and tried. Judge Weinfeld entered a judgment of acquittal for her at the close of the government's case. References to "Gelb" are to Paul Gelb.

[7] Robert Ianniello was granted an order of acquittal at the close of the government's case.

[8] Oscar Ianniello was acquitted by the jury at trial on all counts.

owned by Herbert Taylor ("Taylor"), the bar was controlled by Ianniello and Cohen, who skimmed cash from the receipts of the bar. Bernard Kurtz ("Kurtz") was the manager. Kurtz made the major management decisions, particularly regarding money and expenses. In the fall of 1980, Kurtz hired Frank Rocchio ("Rocchio"), his niece's husband, to book bands for the bar. The bar paid for the bands hired by Rocchio.

By the spring of 1982, the Peppermint Lounge had been closed down a number of times by the New York City Fire Department because of overcrowding. As a result, the Peppermint Lounge moved into the physical facilities of a larger bar and nightclub, which at the time was called the "Electric Circus," whose corporate identity was Circus Disco, Ltd. The name of the "Electric Circus" was changed to the "New Peppermint Lounge."

The facilities of the new nightclub, which operated under a similar format and with essentially the same personnel as the old Peppermint Lounge, was purchased from George Vallario, Jr., Nicholas Orlando and their partners by Kurtz, on behalf of Ianniello and Cohen. The sale was concealed from the SLA, and the New Peppermint Lounge opened for business on May 26, 1982. In the fall of 1982, Kurtz stopped making the weekly payments due to the Vallario group on the purchase of the bar. Shortly thereafter, the Vallario group repossessed the bar from Kurtz.

The defendants skimmed the admission charges at both the Peppermint Lounge and the New Peppermint Lounge. For example, in February 1982, Goldman wrote a letter to the Department "concerning the taxable status of admission charges to a disco and bar." The Department's Sales Tax Instructions and Interpretations Unit responded that the sales tax applied to such charges. Shortly after this, the defendants formed Rock-eo Entertainment, Ltd., named after Rocchio, to divert admission receipts from the New Peppermint Lounge. In a contract between Rock-eo Entertainment and Circus Disco, Rock-eo Entertainment agreed to provide the music as an independent contractor for Circus Disco. Under the terms of the agreement,

Rock-eo Entertainment had complete control over the promotion of music at the New Peppermint Lounge and was obligated to pay all expenses in that regard. The expenses were to be paid from the door receipts, which Rock-eo Entertainment was obligated to collect. The excess door receipts were to be Rock-eo Entertainment's profit. In reality, however, Rock-eo Entertainment was wholly controlled by the defendants; admission charges collected at the New Peppermint Lounge went to the defendants, not to Rock-eo Entertainment.

The defendants had also skimmed the admission receipts at the old Peppermint Lounge by failing to report any income from performances by bands. When audited, defendants argued that the receipts were for concerts, and thus were not subject to sales tax.

At the same time the defendants were skimming money from the Peppermint Lounge, the bar was in Chapter 11 bankruptcy proceedings. The Bankruptcy Court, at the request of the record owner Taylor, authorized the Peppermint Lounge to retain Goldman as its accountant in connection with the bankruptcy proceedings. One of Goldman's responsibilities was to prepare the monthly financial statements or operating reports to be filed with the Bankruptcy Court. Those reports, like the bar's books and records, understated the bar's receipts, concealing the skimming by the defendants.

While the bar was in liquidation proceedings, Cohen and Kurtz also took a worker's compensation insurance refund check payable to the Peppermint Lounge and used it to pay an insurance premium owed by the New Peppermint Lounge.

Ianniello and Cohen also controlled the "Haymarket" and the "Grapevine," once again through Kurtz. Cohen's son, Chester Cohen, held the license for the "Haymarket," while Morton Walker held that license at the "Grapevine." As with the other businesses in which Ianniello and Cohen maintained hidden interests, the purpose of their control of these two bars was to skim their receipts, avoid the payment of sales tax thereon by the corporate owners of the bars, and avoid the payment

of personal income tax on the skimmed receipts by the recipients thereof.

Ianniello and Gelb were the only defendants to present witnesses, though Ianniello and other defendants presented various documentary evidence as well. Ianniello called Internal Revenue Service Special Agent John Ryan, who had testified on behalf of the government. Through Agent Ryan, Ianniello introduced a number of checks paid by C & I Trading to Ianniello during 1982. The checks, which totaled $17,500, were each for $500, and many of them had been cashed. Those falling within the period of the electronic surveillance numbered eight and totaled $4,000.

Gelb called Thomas O'Toole, who testified that in his opinion Gelb had an excellent general reputation, though O'Toole knew nothing about the facts of the case.

All appellants were convicted of conspiracy to violate RICO, and a substantive violation of RICO. Ianniello was also convicted of thirty-five counts of mail fraud and six counts of tax evasion. Cohen was convicted of thirty-five counts of mail fraud, twelve counts of bankruptcy fraud and six counts of tax evasion. Gelb was convicted of nineteen counts of mail fraud and six counts of tax evasion. Kurtz was convicted of sixteen counts of mail fraud and twelve counts of bankruptcy fraud. Walker and Chester Cohen were convicted of two counts of mail fraud. Moskowitz was convicted of eleven counts of mail fraud. Goldman was convicted of eight counts of mail fraud and twelve counts of bankruptcy fraud. Alfred Ianniello was convicted of three counts of mail fraud.

The Indictment

The defendants contend that the prosecution and the court below constructively amended the mail fraud counts of the indictment. The indictment charged mail fraud on both the SLA and the Department. The goals of those frauds are in dispute.

The indictment's first two counts alleged a conspiracy to violate and substantive violation of RICO. In those counts, the

broad goals and purposes of the enterprise were stated to be to obtain liquor licenses through false information, skim profits, evade taxes and defraud the creditors of a bankrupt company. Indictment ¶¶2-9. The indictment then set out the mail fraud and bankruptcy fraud counts, which also served as the RICO predicate acts. Some of the mail fraud counts fail to allege the exact pecuniary goal of the fraud —— stating generally that it was part of a scheme to defraud.

The government and the court below interpret the indictment to charge a broad scheme to skim profits and evade taxes on the restaurants and bars. *See United States v. Ianniello*, 621 F.Supp. 14545, 1474 (S.D.N.Y.1985). Defendants argue, however, that the counts alleging mail fraud on the SLA charge only that they caused false applications and renewal applications for liquor licenses to be submitted to the SLA. Accordingly, they contend, no intent to reap pecuniary benefit or loss was charged by the indictment, requiring dismissal of those counts. *See United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180-81 (2d Cir.1970).[9] Grafting the broad allegations from the RICO counts onto the individual mail fraud counts, they further argue, would violate the rule that "[e]ach count in an indictment is regarded as if it was a separate indictment." *United States v. Fulcher*, 626 F.2d 985, 988 (D.C. Cir.), *cert., denied*, 449 U.S. 839, 101 S.Ct. 116, 66 L.Ed.2d. 46 (1980).

Each count does allege, however, that the defendants participated in a scheme to defraud. The argument that it is impermissible at trial to alter the goal of the scheme as stated in the indictment is foreclosed by *United States v. Weiss*, 752 F.2d 777 (2d Cir.), *cert. denied*, —— U.S. —— , 106 S.Ct. 308, 88 L.Ed.2d 285 (1985). In that case, the goal charged was personal

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[9] The government does not argue that the convictions with respect to the SLA counts are sustainable on any theory of fiduciary obligation. *See United States v. Weiss*, 752 4.2d 777, 783-84 (2d Cir.), *cert. denied*, —— U.S. —— , 106 S.Ct. 308, 88 L.Ed.2d 285 (1985); *United States v. Margiotta*, 688 F.2d 108, 121 (2d Cir.1982), *cert. denied*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983).

enrichment; the goal upon which the defendant was tried and convicted was the creation of a corporate "slush" fund. *See Weiss*, 752 F.2d at 786; *id.* at 791 (Newman, J., dissenting). *A fortiori*, if the goal can be completely changed by proof at trial, it can be made more specific at trial. Moreover, the defendants in this case had ample notice of the core of the charges against them, *see United States v. Heimann*, 705 F.2d 662, 666 (2d Cir.1983); *United States v. Sindona*, 636 F.2d 792, 797-98 (2d Cir.1980), *cert denied*, 451 U.S. 912, 101 S.Ct. 1984, 68 L.Ed.2d 302 (1981), because the theory of the prosecution was stated in the RICO conspiracy counts, and in deciding pretrial motions Judge Weinfeld made the exact nature of the charges clear to the defense. *See United States v. Ianniello*, 621 F.Supp. 1455, 1473-75 (S.D.N.Y. 1985). Even if this were not the case, however, assertions of prejudice from variance would be unavailing, since the defense of the RICO allegations necessarily defended against the SLA mail fraud counts which were listed as RICO predicate acts. *See Berger v. United States*, 295 U.S. 78, 82, 55 S.Ct. 629, 630-31, 79 L.Ed. 1314 (1935); *Sindona*, 636 F.2d at 798-99.

Pattern Requirement of RICO

Appellants contend that *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert denied*, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980), which held that two predicate acts can suffice to satisfy the pattern requirement of RICO,[10] should be reconsidered in light of the Supreme Court's dictum in a footnote in *Sedima, S.P.R.L. v. Imrex Co.*, —— U.S. ——, —— n.

[10] Each substantive RICO subsection, 18 U.S.C. § 1962(a)-(c) (1982), requires a pattern or collection of an unlawful debt (which is not applicable to this case). A pattern of racketeering activity, as defined in the statute, "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. §1961(5) (1982).

14, 105 S.Ct. 3275, 3285 n. 14, 87 L.Ed.2d 346 (1985)[11] Citing legislative history, that footnote indicates that a combination of relationship and continuity between separate acts is required to establish a pattern. Two acts are to be considered as necessary but not sufficient to constitute a pattern. *Id;* 18 U.S.C. § 1961(5) (1982).

This court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc. See In re Jaylaw Drug, Inc.*, 621 F.2d 524, 527 (2d Cir.1980); *Boothe v. Hammock*, 605 F.2d 661; 663-64 (2d Cir.1979). Because the *Sedima*

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[11] The footnote states:

As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.* at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. *Iannelli v. United States*, 420 U.S. 770, 789, 95 S.Ct. 1284, 1295, 43 L.Ed.2d 616 (1975).
105 S.Ct. at 3285 n.14.

footnote does not rise to the level of a holding, it is not controlling. It would be particularly inappropriate in this case, however, to reconsider *Weisman*, since that case carefully and thoughtfully addressed the concerns later considered by the Supreme Court in the *Sedima* footnote. *See Weisman*, 624 F.2d at 1121-23. There is no indication in that footnote that the Supreme Court had considered and rejected the *Weisman* analysis.

Under *Weisman*, relatedness is supplied by the concept of "enterprise" expressed in section 1962(c)[12] and the ten year requirement of section 1961(5). The link between the acts is supplied by the fact that "the predicate acts constituting a 'pattern of racketeering activity' must all be done in the conduct of the affairs of an 'enterprise.'" *Id.* at 1122. This also supplies the necessary element of continuity, since an enterprise is a continuing operation. *See United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981); *see also Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 21-22 (2d Cir.1983) (section 1962(c) requires relation between enterprise and pattern), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984). Thus, it would appear that the difference between *Weisman* and *Sedima* is one of form and not of substance.[13]

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[12] Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate, or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1982). The term "enterprise" also appears in subsections (a) and (b) of section 1962.

[13] Other circuits have also treated the *Sedima* dictum as not marking a sharp departure in the law. *See e.g., Bank of America National Trust & Savings Association v. Touche Ross & Co.*, 782 F.2d 966, 970-71 (11th Cir.1986); *R.A.G.S. Couture, Inc. v. Hyatt*, 744 F.2d 1350, 1355 (5th Cir.1985). *But see Superior Oil Co. v. Fulmer*, 785 F.2d 252, 254-58 (8th Cir.1986).

In fact, support for this view of the case is found in Judge Weinfeld's charge, which met the dictates of *Weisman* and the suggestion of *Sedima*. The jury was instructed at several points that the acts must be related to the enterprise and to a continuous activity. Transcript 3036, 3037-44, 3058, 3061. Thus, any failure to charge in precisely the language contemplated by *Sedima* would be at most harmless error.

Discrete Versus Continuous Criminal Activity

It is also claimed that Chester Cohen was improperly convicted under section 1962(c) of two predicate acts which did not constitute a pattern of racketeering activity within the meaning of the statute. Chester Cohen was convicted on mail fraud predicate acts which, in turn, were based on deceptive license renewal applications in successive years to the SLA for the same establishment.[14] This, he argues, is a single, discrete crime which cannot, as a matter of law, constitute a pattern.

A distinction has been drawn in some cases between crimes aimed at a discrete goal, singular in time and in instance, and crimes commited to further continuing criminal activity. *Compare Professional Assets Management, Inc. v. Penn Square Bank*, 616 F.Supp. 1418, 1420-22 (W.D. Okla.1985) (fraudulent preparation of an audit report is a single instance and therefore crimes to further that goal are not a pattern) *with Rush v. Oppenheimer & Co.*, 628 F.Supp. 1188, 1198-1200 (S.D.N.Y.1985) (multiple instances of churning of a single account, together with related misrepresentations and deceptions, constitute a pattern).

This distinction is derived from the *Sedima* Court's suggestion of relatedness and continuity. *See Soper v. Simmons International, Ltd.*, 632 F.Supp. 244, 250-54 (S.D.N.Y.1986) (discussing evolution of case law dealing with this question since *Sedima*). As discussed above, we believe that the inquiry as to relatedness and continuity is best addressed in the context of

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[14] Walker and Alfred Ianniello were convicted on similar facts, and adopted Chester Cohen's argument on this point.

the concept of "enterprise" expressed in section 1962(c), and to a lesser extent, the ten year requirement of section 1961(5). An enterprise is a "group of persons associated together for a common purpose of engaging in a course of conduct" and "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981). This circuit requires that, under section 1962(c), the enterprise be a continuing operation and that the acts be related to the common purpose. *See Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 21-22 (2d Cir.1983), *cert denied*, 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984); *United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir.), *cert denied*, 461 U.S. 945, 103 S.Ct. 2124, 77 L.Ed.2d 1304 (1983). This result derives from the language of section 1962(c), which requires that the pattern of predicate acts be done in the conduct of the affairs of the enterprise. *See Weisman*, 624 F.2d at 1122. Thus, an enterprise with "a single purpose," here fraud continuing indefinitely, can provide the basis for a section 1962(c) violation. The common purpose in this case was to skim profits and had no obvious terminating goal or date, clearly establishing the enterprise requirement.

The Eight Circuit has adopted a contrary view in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir.1986), holding that "one continuing scheme to convert gas from [a] pipeline" did not provide the "'continuity' sufficient to form a 'pattern of racketeering activity.'" *Id.* at 257. That circuit now requires as part of the definition of pattern proof that the defendants engaged in more than one scheme. *Id. But see Alexander Grant and Co. v. Tiffany Industries, Inc.*, 770 F.2d 717, 718 & n. 1 (8th Cir.1985) (post-*Sedima* decision, upholding as a pattern a series of predicate acts with the goal of obtaining a favorable audit), *cert denied*, —— U.S. ——, 106 S.Ct. 799, 88 L.Ed.2d 776 (1986). We conclude that forcing such a result from the word "pattern" is a strained and inappropriate reading of the statutory language.[15] Furthermore, it would appear that a

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[15] A variant of the *Superior Oil* approach construes *Sedima* to require multiple "episodes" of criminal activity in order to establish a section 1962(c)

(Footnote Continued)

requirement of multiple schemes would undercut section 1962(b), which states:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(b) (1982). This provision does not prohibit an enterprise which is committing predicate acts; rather it prohibits predicate acts which are aimed at taking over an enterprise. *See United States v. Cauble*, 706 F.2d 1322, 1331 n. 11 (5th Cir.1983), *cert denied*, 465 U.S. 1005, 104 S.Ct. 996, 79 L.Ed.2d 229 (1984). It prohibits one scheme to acquire an interest in an interstate enterprise. To require two schemes as part of the *definition* of pattern under section 1961(5) would effectively eliminate this provision.[16]

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pattern. *See, e.g., Frankart Distributors, Inc. v. RMR Advertising, Inc.*, 632 F. Supp. 1198, 1201 (S.D.N.Y.1986)(multiple acts of mail fraud relating to performance of a single contract did not constitute a pattern); *Soper v. Simmons International, Ltd.*, 632 F.Supp. 244, 250-255 (S.D.N.Y.1986)(multiple acts of wire and mail fraud concerning commissions allegedly due with respect to a joint venture did not constitute a pattern). Other recent cases in the Southern District of New York reject the multiple episode requirement, contending that it goes beyond any requirement or legitimate implication of the *Sedima* footnote and provides a vague and unpredictable rule of decision. *See Bankers Trust Co. v. Feldesman*, No. 82 Civ. 5590 (WCC), slip op. at 17-20 (S.D.N.Y. Sept. 3, 1986); *see also Conan Properties, Inc. v. Mattel, Inc.*, 619 F.Supp. 1167, 1170-71 (S.D.N.Y.1985). We agree with the latter view on both counts. As *Sedima* makes clear, 105 S.Ct. at 3287, any further narrowing of RICO, however appropriate that may be, is a job for Congress, not the courts.

[16] It should also be noted that the section 1961(5) definition of pattern requires at least two acts of racketeering activity, not two schemes. "Racketeering activity" is in turn defined as various statutory violations in section 1961(1), which has no language requiring a scheme. *See* 18 U.S.C. § 1961(1) (1982). Clearly then, the multiple scheme requirement is not grounded in the statutory language of RICO. Nor are we directed to any clear legislative history to indicate that when, for example, Congress listed mail fraud as an act, it meant only "scheme-like" fraud. To impose such an element, therefore, violates the

(Footnote Continued)

We decline to embrace this incongruous result. Instead, we hold that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes section 1962(c) to include are satisfied. In this regard, we note that a recent opinion of this court similarly construes *Sedima* footnote fourteen. *See United States v. Teitler*, 802 F.2d 606, 611-12 (2d Cir.1986); *see also Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986) (collecting cases).

SLA Mail Fraud

The defendants also argue that the SLA mail fraud convictions must fall because the SLA original application and renewal forms were too ambiguous to support a finding of intent. *See United States v. Gelb*, 700 F.2d 875, 879 (2d Cir.), *cert denied*, 464 U.S. 853, 104 S.Ct. 167, 78 L.Ed.2d 152 (1983). We disagree. Defendants base their contention on what they term the "confused" testimony of a prosecution expert on the requirements of the forms. However clever defense counsel's cross-examination of the prosecution's witness was, it cannot, and indeed did not, overcome the clarity of those documents themselves.

The original application asks:

> Has any person not an applicant herein, or, if a corporate applicant, any person not an officer, director or stockholder of such corporation, any interest, financial, proprietary or other, direct or indirect, in the premises or in the business to be licensed, or has made any loan to the applicant for said business or has any lien or mortgage on the fixtures in the business?

* * *

Supreme Court's admonition against adding requirements not grounded in the statute or the legislative history. *See United States v. Turkette*, 452 U.S. 576, 593, 101 S.Ct. 2524, 2533-34, 69 L.Ed.2d 246 (1981); *see also Sedima, S.P.R.L.*, 105 S.Ct. at 3285, n. 13 (where legislative history was silent, court below should have followed plain language of statute).

> State whether any person not an applicant herein, or if a corporate applicant, any person not an officer, director or stockholder of such corporation, or any person not reported in [the above question], shares or will share on a percentage basis or in any way in the receipts, losses or deficiencies of the business, to any extent whatsoever other than by fixed salary.

The renewal form asks for the details of any change in fact since the original application was filed. The licensee then represents by signing that "all statements made in the original application for this license and in any and all applications for renewal thereof are true and correct, except as modified in subsequent renewal applications or as otherwise reported. . . ." This language, in context, requires an update of the original application and further requires the licensee to swear that all information recorded with the SLA reflects the current status of the licensee business.

Sales Tax Mail Fraud

Defendants complain that the court below failed to properly charge the jury on the mail fraud counts relating to sales tax evasion. Judge Weinfeld charged that the defendants could be found guilty if the jury found that the stated gross receipts were false or that the reported amount of sales tax due was understated. It is asserted that this allowed the jury to convict even if no tax was due. Assuming this to be true, it is not error.[17]

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[17] Defendants also claim error with respect to the district judge's charge on the question whether admission receipts at the Peppermint Lounge and the New Peppermint Lounge were subject to sales tax. We disagree. The judge charged the jury that:

> In determining whether or not the sale of beverages was merely incidental to the presentation of live musical performances at the Peppermint Loung and New Peppermint Lounge, you may take into account: the number and size of bars within the facilities, whether or not beverages were available during periods when live performances were not presented, whether or not admission was

(Footnote Continued)

In *Gelb*, the defendant had defrauded an insurance company by inflating his claim losses. In the mail fraud prosecution, he argued that the government had failed to prove that his inflated statement of loss resulted in an inflated claim (*i.e.*, he claimed a loss of $684,000 where the insurance coverage was $500,000, and argued that the government had to prove false loss claims in excess of $184,000). The court held that the government need only show a specific intent to defraud. *See Gelb*, 700 F.2d at 879-80; *see also United States v. Rodolitz*, 786 F.2d 77, 80-81 (2d Cir.1986) ("To sustain the [insurance-mail fraud] conviction,

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charged at times during which there were no live musical performances, whether or not musical performances were emphasized in the advertising done by the Peppermint Lounge and the New Peppermint Lounge, and the relative proportion of the revenue produced by admission charges and by the sale of beverages.

Defendants contend that the definition of "merely incidental" is derived from the now repealed federal tax on cabarets. *See In re Tralfamadore Cafe, Inc.*, Advisory Op. TSB-A-85(42)S, at 2 (NYSDTF Taxpayer Services Div. Sept. 9, 1985). Defendants argue that the judge should have instructed the jury that, while the other factors should be considered, the primary factor in this determination is the ratio between the admissions revenues and the sales revenues, citing the *Tralfamadore* advisory opinion.

Assuming this to be so, the evidence against defendants on this score was overwhelming, making any error harmless. *See United States v. Terry*, 702 F.2d 299, 313 (2d Cir.), *cert. denied*,, 461 U.S. 931, 103 S.Ct. 2095, 77 L.Ed.2d 304 (1983); *United States v. Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975), *cert, denied*, 425 U.S. 960, 96 S.Ct. 1742, 48 L.Ed.2d 205 (1976). Taking the figures most favorably to the defendants (exact amounts are difficult to calculate due to the defendants' conduct), approximately forty-two percent of revenues was derived from liquor sales alone. Where forty-percent of revenue was derived from the sale of concessions and refreshments, that in itself was enough to impose the tax. *See Kantor v. United States*, 154 F.Supp. 58, 60-62 (N.D.Tex. 1956) (The issue in *Kantor* was whether the analogous federal tax would be imposed upon refreshments as well as admissions, but the statutory interpretation is nonetheless both relevant and persuasive.). The bars frequently operated without bands, and when bands did play, they performed for short periods of time. At all times, moreover, the bartenders served drinks. The bar also did not always charge for admission, apparently hoping to increase liquor revenues. The Peppermint Lounge had two dance floors and three bars, and is described as a bar in its sales tax returns.

the government needed to prove only that Rodolitz employed a deceptive scheme intended to prevent the insurer from determining for itself a fair value of recovery."). Similarly, in this case the government need only show a specific intent to evade sales taxes. The evidence in the record to support such a finding was ample.

Twenty-First Amendment

The defendants also claim that the twenty-first amendment bars this mail fraud prosecution. However, the federal government's lack of direct power to regulate intrastate liquor does not necessarily imply that it cannot prosecute conduct that also implicates federal concerns. *See Parr v. United States*, 363 U.S. 370, 389, 80 S.Ct. 1171, 1182, 4 L.Ed.2d 1277 (1960) (Congress can forbid conduct through mailing in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not, quoting *Badders v. United States*, 240 U.S. 391, 393, 36 S.Ct. 367, 368, 60 L.Ed. 706 (1916)); *United States v. DeFiore*, 720 F.2d 757, 761-62 (2d Cir. 1983) (same in wire fraud context), *cert. denied*, 466 U.S. 906, 104 S.Ct. 1684, 80 L.Ed.2d 158 (1984) and 467 U.S. 1241, 104 S.Ct. 3511, 82 L.Ed.2d 820 (1984); *cf. Illinois Department of Revenue v. Phillips*, 771 F.2d 312, 317 (7th Cir.1985) (State of Illinois was a proper plaintiff in a RICO action brought to recover treble damages for evasion of Illinois sales tax). The defense cites cases that hold that federal statutes in which liability is expressly and solely based upon violations of state liquor laws are beyond federal power, *United States v. Constantine*, 296 U.S. 287, 294, 56 S.Ct. 223, 226, 80 L.Ed. 233 (1935); *United States v. Kesterson*, 296 U.S. 299, 300, 56 S.Ct. 229, 80 L.Ed. 241 (1935), and that state regulation of commerce in liquor pursuant to section 2 of the twenty-first amendment may be preempted by federal antitrust laws if the federal policies outweigh the state interests, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 113-14, 100 S.Ct. 937, 947-48, 63 L.Ed.2d 233 (1980). Those cases do not support the proposition that the federal government cannot prosecute misuse of the mails where that misuse also violates state liquor regulations.

Corroboration of
Co-conspirator's Statements

Defendants assert that the evidence of tax evasion by Ianniello, Cohen and Gelb was insufficient because it consisted largely of the uncorroborated statement of Gelb.[18] A conviction cannot be based solely on an uncorroborated extrajudicial confession. *See Opper v. United States*, 348 U.S. 84, 89-90, 75 S.Ct. 158, 162-63, 99 L.Ed. 101 (1954). From this proposition, the defense extrapolates the theory that an uncorroborated admission should not be sufficient to convict.

In *Smith v. United States*, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954), the Court noted that "[a]dmissions given under special circumstances, providing grounds for a strong inference of reliability, may not have to be corroborated. *Cf. Miles v. United States*, [103 U.S. (13 Otto) 304, 26 L.Ed. 481 (1980)]." *Smith*, 348 U.S. at 155 n. 3, 75 S.Ct. at 198 n. 3. In *Miles*, the defendant was charged with bigamy and the evidence of his first marriage was his own uncorroborated statements. *Miles v. United States*, 103 U.S. (13 Otto) 304, 311-12 (1880). The court affirmed the conviction because there were independent indicia of reliability. *Id.* at 312.

The *Smith* Court held that the rule requiring corroboration applied to admissions when the admission is made to the authorities after the crime and it establishes an essential element

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[18] PAUL GELB: The whole fuckin' thing is here we cannot go ahead and have another four years here that we think we gonna be like that. You're talking about four years which, which we can very well say that we, at least we averaged out, at least a half a million dollars a year that we cut up. I would say conservatively, you understand? Which, is uh, which is easy. I would say closer to two and a half but that's alright let's say even closer to two and a half million for four years.

Which, uh, we cannot go ahead and consider ourselves losers here. But you know this operation as long as it's goin who the hell wants to change it for the time being?

BEN COHEN: I know.

(Footnote Continued)

of the crime. 348 U.S. at 155, 75 S.Ct. at 198-99. This was based on a concern that admissions may be coerced or otherwise unreliable. *Id.* at 153, 75 S.Ct. at 197-98. Thus, when corroboration is required, its aim is to ensure the reliability of the statement. *Id.* at 156-59, 75 S.Ct. at 199-201; *see also Chambers v. Mississippi*, 410 U.S. 284, 298-301, 93 S.Ct. 1038, 1047-49, 35 L.Ed.2d 297 (1973); *Donnelly v. United States*, 228 U.S. 243, 277-78, 33 S.Ct. 449, 461, 57 L.Ed. 820 (1913) (Holmes, J., dissenting).

The proper inquiry, therefore, is whether the statements of Gelb bear independent indicia of reliability. *Cf. United States v. Rodriguez*, 706 F.2d 31, 40 (2d Cir.1983) (in context of Federal Rule of Evidence 804(b)(3)); *United States v. Beltempo*, 675 F.2d 472, 479-80 (2d Cir.) (same), *cert. denied*, 457 U.S. 1135, 102 S.Ct. 2963, 73 L.Ed.2d 1353 (1982). The circumstances of the conversation, a discussion between Gelb and Cohen about their businesses' performances, as well as numerous deliveries of cash before and after the statement, provide that reliability. In any event, the cash deliveries provide the corroboration necessary for conviction even under the defense theory.

Conclusion

We have examined the remaining defense contentions and find them to be without merit. The judgments of conviction are accordingly affirmed.

PAUL GELB: You understand? How long? I don't know, but eventually we should be thinking ahead of time what we want to do here instead. The custom, this operaton is outrageous.

BEN COHEN: I know.

PAUL GELB: And if you do over the fifty thousand, you do over fifty thousand, it pays, you understand? Because you have to, you have to pay (UI). This, that, that but you coming out, you clean. Clean you come out fifteen thousand dollars a week.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 28th day of January one thousand nine hundred and eighty-seven.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MATTHEW IANNIELLO, BENJAMIN COHEN, PAUL GELB, ALFRED IANNIELLO, CARL MOSKOWITZ, MORTON WALKER, CHESTER COHEN, BERNARD KURTZ and SOL GOLDMAN,
Defendants-Appellants.

Nos. 86-1088, 86-1089, 86-1090, 86-1091, 86-1092, 86-1093, 86-1102, 86-1109, 86-1110,

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Petitions for rehearing containing suggestion that the action be reheard in banc having been filed herein by counsels for the defendants-appellants, Mathew Ianniello, Benjamin Cohen, Paul Gelb, Alfred Ianniello, Carl Moskowitz, Sol Goldman, Bernard Kurtz, counsel for Morton Walker, and Counsel for Chester Cohen,

Upon consideration by the panel that hear the appeal, it is

ORDERED that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the Court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon, rehearing in banc is denied.

Elaine B. Goldsmith,
Clerk

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